Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1976

JOHN RAYMER,
Petitioner

VS.

DOUBLEDAY & COMPANY, INC., THOMAS THOMPSON, AND NORTH BRANCH ROAD CORPORATION

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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John Raymer prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 8, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 615 F.2d 241.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on April 8, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The basis for federal jurisdiction in the Court of first instance is 28 U.S.C. 1332(a) and Article 2031b Texas Revised Civil Statutes.

QUESTIONS PRESENTED

1. Whether there was error in granting, in whole or in part, Respondents' motions for summary judgment.

2. Whether New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed2d 686, 84 S.Ct.710(1964) and its progeny, should be applied to a book that is, in many respects, a fictional novel.

3. Whether New York Times Co. v. Sullivan, and its progeny, should be applied when the stated purpose of the author, in regard to Petitioner, was not to comment in his book on a public issue or Petitioner's fitness for public office.

4. Whether New York Times Co. v. Sullivan, and its progeny, should be applied when libelous statements are not "hot news," and are contained in a hard cover book that took over two years to publish.

5. Whether New York Times Co. vs. Sullivan, and its progeny, should be applied to libelous statements that have nothing to do with fitness for public office or performance of public duties.

6. Whether the "public official test" of New York Times Co. v. Sullivan, and its progeny, should be applied to Petitioner when the author of the pertinent book clearly inferred that Petitioner was not a significant public official or individual, and whether Petitioner is otherwise a "public official" under New York Times v. Sullivan.

7. Whether there was error in refusing a libel per se instruction to the jury where certain passages of the pertinent book clearly and unambiguously attribute acts and omissions to Petitioner that violate Sections 39.01 and 39.02 of the Texas Penal Code and 18 U.S.C. Section 242.

8. Whether the trial court erred in instructions to the jury that gave contrary meanings to clear and unambiguous libelous statements in issue.

9. Whether the trial court erred in allowing the Respondent author to testify concerning his intent, motive, custom, and standards of care pertaining to passages involving Petitioner.

10. Whether the trial court erred in not allowing Petitioner to cross-examine the author regarding his intent, motive, custom, standard of care, or in refusing Petitioner opportunity to impeach the author or to show the author's bias or lack of care.

11. Whether the trial court erred in instructing the jury that in order for a public official to recover exemplary damages, he must not only meet the actual malice test of New York Times Co. v. Sullivan, and its progeny, but must also show a specific intent to harm the official by the author.

12. Whether the trial court erred in failing to submit to the jury all statements of alleged libel set out in Petitioner's First Amended Complaint.

13. Whether the combination of trial court errors above set out constituted reversible error that contributed to the jury's negative answer to Special Interrogatory No. 1.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of Texas Penal Code Sections 39.01 and 39.02 and 18 U.S.C. Section 242 are set forth in the Appendix at pp. 22-24.

STATEMENT

This is a libel action. Summary judgment was rendered in favor of Doubleday & Company, Inc. Except for passages submitted to a jury, partial summary judgment was rendered in favor of the other Respondents. The jury was given a general charge and special interrogatories to answer. In the first interrogatory, the jury answered there was no defamation. Therefore, it was not required to answer the "actual malice" and damage interrogatories. Upon the jury verdict judgment was rendered in favor of the author. The trial court granted an order consolidating the appeals from both judgments.

On or about May 14, 1974, Petitioner was a municipal policeman just promoted to sergeant (R.239). On or about April 22, 1974, he was informed that a man was carrying a weapon at a cafe where alcoholic beverages were sold (R.222), a felony offense under Texas law (R.223). An attempted arrest of the man was unsuccessful (R.223-225).

Through informants and routine police work, Petitioner later learned that the man in question was Bobby Vandiver and that he was wanted for possession of burglary tools, murder, and jumping bond for murder (R.221-232). In the second attempt to arrest Vandiver, he pulled a gun and tried to shoot Petitioner (R.221-232). Petitioner, in defense of his own life, and in hand to hand combat, shot and killed Vandiver (R.221-232). Before and after the shooting of Vandiver, Petitioner received information that Vandiver had threatened to kill the next policeman that tried to arrest him (R.233, 235). A thorough investigation of the shooting of Vandiver was made, the events of the shooting were well documented, and Petitioner was no-billed by a grand jury (R.231-233).

Thomas Thompson was the author of the book Blood and Money, the sole stockholder of North Branch Road Corporation, and said corporation obtained a copyright to publish Blood and Money (R.52-54). Doubleday & Company, Inc. was the publisher of said book (Exhibit 1, R.252).

In September, 1976, Blood and Money was published (R.58). Petitioner was named therein. His personality, status, physical description, and the way he generally performed his duties were de-

scribed as true facts in Blood and Money. The detection, attempted arrest, and shooting of Vandiver was described.

Prior to the writing and publication of Blood and Money, the author interviewed Petitioner at the trial of Vandiver's alleged co-conspirator in the murder trial of a prominent physician (R.94-95). The author made handwritten and typed notes of his interview with Petitioner which were introduced into evidence, but not revealed to the jury. The notes contained derogatory remarks about Petitioner.

Blood and Money was the fourth published book of the author (R.51-52). He defined it as a non-fiction work (R.56). A novel was defined as a work of fiction, i.e., something that was made up (R.56). The author used his imagination and his creative writing technique in writing the book Blood and Money (R.57). His technique was to make the story as vivid and as interesting as he could (R.64), applying the techniques of novel writing.

The author wrote a magazine article for Writer's Digest entitled "Nonfiction Books: The New Best Sellers" where Blood and Money was described (R.65, Exhibit 4). In the magazine article he professed belief in the power of narrative and asked why, in writing a book, can't there be a compelling yarn as well? He admitted to shamelessly building some sort of teaser or climax at the conclusion of each chapter. He wanted to use dialog but warned that it was a tricky area, one frought with peril, but when someone spoke in a book, the book came alive.

In writing Blood and Money the author used both the typewritten and handwritten notes (R.99). He described the handwritten notes as urgent and hurried (R.97), but admitted that he had an hour and a half conversation at lunch with Petitioner (R.101-102). During an interview, it was his custom to add his own comments and observations (R.71). From the handwritten notes, the typewritten notes were made and they contained the author's impressions and observations, comments, and story ideas (R.71,72,76,77,79,97,98,99).

It took the author the better part of two years to research and write Blood and Money (R.112). He found "hot news" to be a demeaning term as applied to a book (R.111), he would not apply the term to a book (R.55), and he had plenty of time to verify or substantiate what he was writing (R.55).

In supporting affidavits to their motions for summary judgment, all Respondents stated that Petitioner's name never was mentioned nor came up during reviews of Blood and Money that occurred prior to publication. At trial, the author and other witnesses so testified (R.122-127, 369). An envelope of sealed materials, attached to the stipulation and protective order proposed by the Respondents, contained galley proofs and other materials which indicated several reviews of Blood and Money by all Respondents prior to publication. The author, in investigating his story, came to Longview, Texas, but did not interview the available legal investigators of Vandiver's shooting (R.139,242). However, in writing Chapter 35 of Blood and Money, the author used false information given to him by criminals (R.137-140).

Prior to writing Blood and Money, the author worked for a newspaper and became familiar with policemen, their attitudes, and their responsibilities (R.50,54). He recognized it was a serious matter to say that a policeman runs people out of town (R.80). His mental impression of Petitioner was that Petitioner was a fairly tolerant man with a sense of humor and was pleasant (R.72,76,77,79,86).

In regard to the passages submitted to the jury, the author called them a prelude, a drum roll, the setting of the scene (R.87-88). He was not commenting on a public issue or Petitioner's fitness for public office. The passages were/are clear and unambiguous, and had no other reasonable meaning than Petitioner, a policeman, would use his position to run people out of town and, as a policeman, allow out of town hookers to ply their ancient trade for a day or two before leaving. The author admitted to such meanings (R.81,82,86,87,88,90,110,111). Author's counsel recognized that a policeman acting outside the law could be prosecuted, and as a general premise, that falsely charging one with a crime is libelous (R.333).

In regard to one submitted passage, the trial court asked the publisher's counsel if one of the passages did not plainly suggest that Petitioner was rousting people out of town, disregarding people's civil rights, and that sanctions might be taken if people did not leave town. Another question by the court was if misuse of power would be a violation of law (Record to reconsider motion for summary judgment 20-22). The trial court gave the same interpretation to the other submitted passages (R.7-9). Petitioner made a motion that the jury be instructed that the submitted passages were libelous

per se, and at one time it was the intention of the trial court to so instruct the jury (R.294-295). Petitioner objected to the submission of special interrogatory number one, to the failure of the court to give a libelous per se instruction, and to an instruction by the court to the jury that was contrary to the clear and unambiguous meaning of the submitted passages (R.428,440,441).

In regard to one of the submitted passages, the author admitted that nobody told him the involved cafe housed for a few hours the kind of folk Petitioner wanted to escort out of town and that said statement was his own impression (R.85). He used his position as a narrator to paraphrase "He found reason to suggest a quick leave-taking" (R.110).

Petitioner, a well-educated policeman who knew it was against the law to run people out of town, denied telling the author of published books that he ran people out of town (R.236,238,241,242, 243). At the time of his interview, Petitioner knew the author was going to write a new book (R.242).

The author said Petitioner told him that Petitioner ran people out of town (R.107). However, it was admitted that the phrase "run 'em out if stay longer than a day or two" appeared only once in the author's notes (R.76) wherein, as previously admitted, he added his own comments and story ideas (R.71). He admitted that Blood and Money taxed his imagination and that the end result may be a crossword puzzle with half the pieces missing (Exhibits 5,6, R.153-154).

Petitioner also denied making several other statements that appeared in the

author's notes in Blood and Money (R.149-151). He denied using the work "character" (R.150). The record does not disclose that Petitioner in fact ran people out of town or knowingly allowed out of town hookers to stay in town a day or two. The opposite was true (R.254).

Over objection (R.44,45,90,110) the Respondent author and other defense witnesses were allowed to testify that the submitted passages were not libelous, that there was no intent to harm by them, and about their motives, customs, and standards of care in writing Chapter 35 of Blood and Money (R.36,44,93,101,109,115,123,124, 125-129). Petitioner's offered proof to the contrary was excluded, and he was not allowed to cross-examine or impeach the author about said matters (R.10-11,130-132,134-152). Author's counsel recognized the law that the submitted passages stood in ordinary language for themselves (R.173-174).

Over objection, the trial court instructed the jury that, in addition to finding "actual malice," they must find a specific intent to harm the Petitioner by the author before exemplary damages could be awarded (R.441-443,455,458). Petitioner's offer of proof of other alleged libelous statements was overruled (R.293). His objection to being classified a public official was overruled.

The Court of Appeals affirmed. It ruled, by footnote, that New York Times v. Sullivan, 376 U.S.254, 11 L.Ed.2d 686, 84 S.Ct. 710(1964) required Petitioner to prove "actual malice" in order to recover.

REASONS FOR GRANTING THE WRIT

This case should be reviewed to determine if New York Times v. Sullivan, and its progeny, is applicable to a work of fiction and statements of imagination. This case should be reviewed to decide if Petitioner was properly classified "a public official" when the author clearly indicated that Petitioner was not a significant individual, and that he was not commenting on a public issue. This case should be reviewed to determine if Petitioner was properly classified a "public official" when there was nothing in the record that indicated he was in a position to significantly influence the resolution of a public issue or had substantial responsibility for or control over governmental affairs. This case should be reviewed to decide if there were statements of libel involved pertaining to Petitioner's personality, physical description, and aspirations, or lack thereof, to which New York Times v. Sullivan did not apply. This case should be reviewed to decide if New York Times applies when the publication is not "hot news." Lastly, this case should be reviewed to determine if the case was properly tried under applicable libel law.

New York Times v. Sullivan was never meant to apply to a work of fiction or statements of imagination. St. Amant v. Thompson held 390 U.S. 727,731-732:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the

> statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where they are obvious reasons to doubt the veracity of the informant or the accuracy of his report. Found in the dissent: The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. New York Times does not preclude this minimal standard of civilized living.

No case requires that Petitioner, a municipal policeman, be classified a public official. This was made clear in Rosenblatt v. Baer 383 U.S. 75, 85-86, 15 L.Ed 597, 605-606, 86 S.Ct. 669 (1966). Petitioner was a patrolman for 8 years and two months

prior to Vandiver's shooting. His function, as any ordinary policeman's, was to detect and arrest those who commit crimes. It was, and is, in the real world a very limited function. Petitioner had no substantial responsibility for, or control over, the conduct of governmental affairs, and he had no position to significantly influence the resolution of public issues. Petitioner did not talk to the press about Vandiver's shooting.

The author noted, Petitioner did not expect, at the age of 49, to light historic fires; and allegedly, Petitioner was well accomodated to the fact that he had made but slight scratches on the faces of the earth (R.311-312). The author also observed that the passages pertaining to running people out of town, or finding a reason for them to take their quick leave-taking, were not the least bit important (R.116). To the author, the important thing in Chapter 35 of Blood and Money was that Bobby Vandiver died and, thus, devastated a criminal case in Houston, Texas (R.116). It was error to require that Petitioner meet the "actual malice" test of New York Times v. Sullivan.

However, Petitioner met the "actual malice" test, i.e., he showed the author made the submitted statements with knowledge that they were false or with reckless disregard of whether they were false or not.

The author claimed Petitioner, and no other, as the source of the statement that Petitioner ran people out of town. Petitioner denied the statement. The conclusion was available that the statement was fabricated by the author. The author applied the techniques of a fictional

novel. He used his imagination and creative writing techniques. He recognized, as an experienced reporter, that it was a serious statement to say that a policeman ran people out of town. To substantiate the accuracy of his run people out of town reports, he asked the public to believe a well-educated and experienced policeman who knew that it was against the law to run people out of town told him such - after the policeman was advised that the author was writing a book. He failed to interview credible sources of information. No one told him that the Continental Cafe housed the kind of folk that Petitioner ran out of town, and he paraphrased the suggestion of quick leave-taking. The record did not disclose that Petitioner, or anyone else, told the author that he would allow an out-of-town hooker to stay in town a day or two (R.386-387). The author knew that Petitioner was a fairly tolerant man with a sense of humor. Clearly, in regard to the author, Petitioner met the "actual malice" test. Also, when the story is not "hot news," as is the case here, the investigation must be more thorough, and "actual malice" may be inferred when the investigation was grossly inadequate in the circumstances Vandenburg v. Newsweek, Inc. 507 F.2d 1024, 1026 (5th Cir.1975). Therefore, the publisher was liable for not making a reasonable investigation when it had ample time to do so.

The opinion of the Court of Appeals contains the statements about Petitioner's personality, aspirations, or lack thereof, and physical description. It contains the Texas Statutory definition of libel. Under the Texas libel statute, it is libel by printing or writing to injure the reputation of one who is alive, and thereby

expose him to public hatred, contempt, or ridicule, or to publish the natural defects of anyone, and thereby expose such person to public hatred, ridicule, or financial injury.

Petitioner holds a masters degree and teaches part time at the University of Texas at Tyler. The Court of Appeals held that baldness of pudginess did not qualify as natural defects under Texas libel law, and it failed to see that the false statements about Petitioner's personality or aspirations were libel. It is respectfully submitted that the Court of Appeals was in error. To publicly poke fun in writing, or otherwise, about one's natural physical description was always actionable and serious business (2 Kings 2:23-24 Good News Bible):

> Elisha left Jericho to go to Bethel, and on the way some boys came out of a town and made fun of him. "Get out of here, baldy!" they shouted.
>
> Elisha turned around, glared at them, and cursed them in the name of the LORD. Then two she-bears came out of the woods and tore forty-two of the boys to pieces.

The author gave the impression that he was intimate with Petitioner, and what he wrote about him was true, because of the author's first hand knowledge of Petitioner. An hour and one half interview, at the most, hardly justified the conclusion that Petitioner was well accommodated to the fact that he had made but slight scratches on the face of the earth. This false description of Petitioner certainly exposed Petitioner to ridicule and injured his reputation.

All of the above was raised and preserved in both lower courts. The Court of Appeals ignored the above issues. The honorable judges thereof stated in oral argument, that if they found no libel, the above issues would not have to be decided (Record of Oral Argument Court of Appeals). The Court of Appeals also ignored raised errors about the conduct of the District Court trial.

What the District Judge initially decided was that the passages submitted to the jury were libel per se. He later erroneously changed his ruling. As the Court of Appeals held, a statement which unambiguously and falsely imputes criminal conduct to the plaintiff is actionable per se, and it is error to submit to the jury the question of whether such statements are defamatory. There was nothing ambiguous about the following false passages:

1. In his nine years on the force Sergeant Raymer ran some of Dallas' meanest men out of his town.

2. If an out-of-town hooker or robber-lookin' fellow turned up and stayed but a day or two before moving on, then John Raymer let them be. But should one hang around town long enough to arouse his suspicion, John Raymer would find reason to suggest a quick leave-taking.

3. Directly beside the I-20, it captured hungry late night travelers and sent them on gulping antacids, and it often housed for a few hours the kind of folk Raymer wanted to escort out of town.

The said statements charged Petitioner with acts and omissions that violated the Texas Penal Code Sections 39.01 and 39.02 and 18 U.S.C. Section 242. It was reversible error to not charge that the above language was libel per se, and it was reversible error to submit Interrogatory No. I to the jury. Therefore, it was also reversible error to give the objectionable jury charge approved in the opinion of the Court of Appeals.

Over objection (44,45,90,110) the author and other defense witnesses were allowed to testify that the submitted passages were not libelous, what was meant by them, that there was no intent to harm by them, and about their motives, customs, and standards of care in writing Chapter 35 of Blood and Money (R.36,44, 93,101,109,115,123-129). The submitted passages were clear and unambiguous, and the trial court was required to construe their meaning from the article as it was commonly understood. The intent or meaning of the Respondents in using the words was not controlling in construing them and in passing on their actionable quality 36 Tex.Jur.2d Libel and Slander Sections 26,36.

Petitioner pleaded "actual malice" and sought exemplary damages. Yet the trial court did not allow the Petitioner to cross-examine or impeach the author about his intent and motives and excluded an offer of proof about his intent and motives (R.10-11, 130-132, 134-152). The author's motive and intent may be shown on the issue of malice where Petitioner seeks to recover exemplary damages because ill motive and bad intent

are elements of malice. It may also be shown where "actual malice" is in issue Herbert v. Lando, U.S. , 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979); Buck v. Savage 323 S.W.2d 363,368 (Tex.Civ.Ap.-Houston 1959, writ ref'd n.r.e.); Snider v. Leatherwood 49 S.W.2d 1107, 1111 (Tex.Civ.App.-Eastland 1932, writ dism'd); United Press International, Inc. v. Mohs 381 S.W.2d 104, 110 (Tex.Civ.App.-Eastland 1964, writ ref'd n.r.e.); 36 Tex.Jur 2d Libel and Slander Sections 39, 152, 159. The trial court erred in not allowing Petitioner to cross examine or impeach the author and refusing Petitioner's offer of proof.

This was especially harmful error because the author was allowed to portray himself in a good light before the jury with Petitioner's hands tied by the trial court to show the contrary. With the trial court's erroneous instruction, there was no question that all of the above was the reason the jury found no defamation.

No appellate case required Petitioner, to recover punitive damages, to meet more than the "actual malice" test. The trial court erred when it instructed the jury that Petitioner must also show a specific intent to harm him by Respondents, to recover punitive damages, after he meets the "actual malice" test.

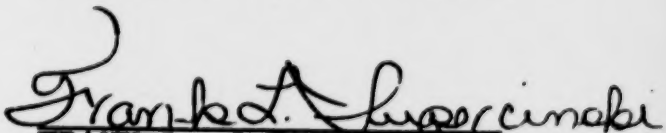
Petitioner respectfully contends it was error to not submit either as libel per se, or actionable libel, all of the statements set out in his complaint and discussed in the opinion of the Court

of Appeals. Even if he is classified a "public official," many of the said statements have nothing to do with the way Petitioner performed his duties or his fitness for office. Therefore, said statements should be submitted to the jury under libel law excluding the New York Times rule application.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frank L. Supercinski, a member of the Bar of the Supreme Court of the United States and counsel of record for John Raymer, Petitioner herein, hereby certify that, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of this petition for writ of certiorari on each of the parties herein, as follows:

On Doubleday & Company, Inc., Respondent herein, by mailing copies thereof to The Honorable Robert M. Callagy, Satterlee & Stephens, 277 Park Avenue, New York, New York 10017, on the 23rd day of May, 1980. On Thomas Thompson and North Branch Road Corporation, Respondents herein, by mailing copies thereof to The Honorable Tom Lorance, Lorance Thompson & Wittig, 303 Jackson Hill at Memorial Drive, Suite 300, Houston, Texas 77007 on the 23rd day of May, 1980.

All parties required to be served have been served. Dated the 23rd day of May, 1980.

Frank L. Supercinski

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APPENDICES

Texas Penal Code Sec.39.01 Official Misconduct

(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly:

(1) commits an act relating to his office or employment that constitutes an unauthorized exercise of his official power;

(2) commits an act under color of his office or employment that exceeds his official power;

(3) refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment;

(4) violates a law relating to his office or employment; or

(5) takes or misapplies any thing of value belonging to the government that may have come into his custody or possession by virtue of his employment, or secretes it with intent to take or misapply it, or pays or delivers it to any person knowing that such person is not entitled to receive it.

(b) For purposes of Subsection (a)(2) of this section, a public servant commits an act under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under Subsections (a)(1) through (a)(4) of this section is a Class A misdemeanor. An offense under Subsection (a)(5) of this section is a felony of the third degree.

Texas Penal Code Sec.39.02
Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a Class A misdemeanor.

Title 18 U.S.C. Sec.242
Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.